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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 542

JOSEPH P. BASS,

Petitioner,

vs.

BALTIMORE & OHIO TERMINAL RAILROAD

COMPANY, A CORPORATION,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

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SUMMARY STATEMENT.

The questions are jurisdictional: The petition for certiorari was not duly applied for in the Supreme Court within the three month's statutory limitation

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The Circuit Court of Appeals properly dismissed the appeal in that the order appealed from, that of overruling motion for new trial, was not a final, appealable order under Federal practice and statutes

TABLE OF CASES AND STATUTES CITED.

Citizens Bank of Michigan City v. Opperman, 249 U. S. 448, 63 L. ed. 701	2
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PRELIMINARY STATEMENT AS TO JURISDICTION
AND JURISDICTIONAL QUESTIONS.

In this case, the writ of certiorari is sought to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, which dismissed an appeal by petitioner, plaintiff below, in a cause in the District Court for the Northern District of Illinois, Eastern Division (rec. 185). This dismissal was on June 10, 1944 (rec. 185).

Rehearing was asked for by petitioner in the Circuit Court of Appeals by petition filed June 26, 1934 (rec. 190). This petition for rehearing was denied June 30, 1944 (rec. 208).

The petition for certiorari herein was not filed until more than three months thereafter. It was filed October

2, 1944, which is more than three months after June 30, 1944 (Docket, Supreme Court).

The statute in this regard is Title 28, U.S.C.A., Sec. 350:

"No writ * * * or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor duly be made within three months after the entry of the judgment or decree * * *."

Thus there is a preliminary question of jurisdiction to entertain the application for the writ.

On the authority of *Citizens Bank of Michigan City v. Opperman*, 249 U. S. 448, 63 L. ed. 701, where a petition for rehearing has been entertained in the lower court, the three months' limitation begins to run from the date of the denial of the petition.

It follows, it is submitted by respondent, that the application for the writ of certiorari herein was filed too late and should be dismissed.

Wherefore, respondent asks that the petition for writ of certiorari be dismissed.

As to the questions raised in the petition for certiorari, respondent further contends the Circuit Court of Appeals properly dismissed petitioner's appeal in the cause. It was taken from the order of the District Judge overruling a motion for new trial and the Circuit Court had no jurisdiction for an appeal from such order.

STATEMENT OF THE CASE.

On the questions as presented on the record to the Supreme Court, it is submitted for respondent, there is no occasion for further statement on the jurisdictional questions than has already been made.

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

Under federal practice and the federal statute on appeals from the District Court to Circuit Courts of Appeals, an order overruling a motion for new trial is not a final judgment within sec. 128 of the Judicial Code (U. S. C. A. Title 28, Sec. 225) fixing appellate jurisdiction and an appeal therefrom was properly dismissed.

Luckenbach Steamship Company, Inc. v. United States, 272 U. S. 533, 71 L. ed. 394.

United States v. Endicott, 223 U. S. 524, 56 L. ed. 535.

Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 63 Sup. Ct. 133.

Brocket v. Brocket, 2 How. 238, 11 L. ed. 251.

Brown v. Clarke, 4 How. 4, 11 L. ed. 850.

Sec. 128, Jud. Code, Title 28 U.S.C.A. sec. 225.

Title 28 U.S.C.A. sec. 230.

ARGUMENT.

Under federal practice and the federal statute on appeals from the District Court to Circuit Courts of Appeals, an order overruling a motion for new trial is not a final judgment within sec. 128 of the Judicial Code (U. S. C. A. Title 28, Sec. 225) fixing appellate jurisdiction and an appeal therefrom was properly dismissed.

Petitioner was plaintiff below and respondent was defendant in an action under the F. E. L. A. (rec. 2-4). Following a verdict of not guilty (rec. 168), final judgment (that defendant-respondent go hence without day) was entered April 8, 1943 (rec. 168). Petitioner made a written motion for new trial April 16, 1943 (rec. 169), which was overruled by an order of court entered August 3, 1943 (rec. 171). It was from the latter order "denying plaintiff's motion for new trial" the appeal herein was taken by plaintiff-petitioner by a notice of appeal filed November 2, 1943 (rec. 171).

It was because the appeal was taken from the order overruling the motion for new trial, rather than from the final judgment entered, the Seventh Circuit Court on appeal dismissed the appeal *sua sponte*. In doing so it said:

"Under federal practice such an order is not subject to appeal, although it may be reviewed for error in law, on appeal from a final judgment, when the ruling has been properly assigned as error" (rec. 184).

It is the position of respondent that the action of the Court of Appeals was proper in view of authorities on federal practice and the statutory provisions on appeals.

The practice in this regard reflects the statute as well. The latter, it is suggested, must necessarily be followed to obtain an appeal, for as said in *Luckenbach Steamship Company, Inc. v. United States*, 272 U. S. 533, 71 L. ed. 394, 395:

"And apart from the nature of these suits, the well settled rule applies that an appellate review is not essential to due process of law, but is a matter of grace."

Applicable statutes are:

U.S.C.A. sec. 225 (sec. 128, Judicial Code). (a) Review of final decisions. "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review may be had in the Supreme Court under section 345 of this title."

Sec. 230. No writ of error or appeal intended to bring any judgment or decree before a circuit court shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

It is submitted it is the plain purport of the two foregoing sections (to be read together) that it is final judgments which are to be appealed from the District Court to the Circuit Courts of Appeal, and within three months, not other intermediate or interlocutory orders.

It is petitioner's underlying and counter-proposition that his notice of appeal was only supposedly inadequate and that he merely made misstatements therein (Supporting brief, page 5). But we think it clear the notice of appeal manifested an assumption that an order overruling a motion for new trial was an appealable order. There is no ambiguity or uncertainty in or about the fact such was the order selected as the basis for review. The point

is simply whether such order was the subject for an appeal. The Circuit Court of Appeals held it was not and we believe that view is in accordance with the federal practice and statutes from early days on down to the present time.

In this regard, decisions from the Supreme Court have distinguished orders overruling new trials and final judgments.

In *Brown v. Clarke*, 4 How. 4, 11 L. ed. 850, the court stated the rule in federal courts was that error did not lie for the refusal of the court below to grant a new trial. In stating the federal rule, it pointed out the practice to the contrary in Mississippi was by virtue of a state statute.

Again, the distinction between such orders and judgments is shown by the opinion of the Supreme Court in *Luckenbach v. Steamship Company*, 272 U. S. 533, 71 L. ed. 394. In that case there was involved a judgment, and a motion for new trial overruled, together with appeals therefrom. The court said, page 395:

“Plainly the second (new trial order) was not (appealable), for it was an order which was not appealable. But the first was from the judgment and we think it well taken.”

It is to be further noted in the foregoing *Luckenbach* case the court gave the pendency of the motion for new trial the effect of preventing judgments from becoming final so as not to cause the time to run against the right to appeal from the judgment.

The appeal in the case was from the court of claims rather than a circuit court of appeals but the rule in the particular regard is the same for both courts. Such is well indicated by *United States v. Endicott*, 223 U. S. 524, 56 L. ed. 535, relied on in the foregoing *Luckenbach* case.

In *United States v. Endicott*, 223 U. S. 524, 56 L. ed. 535, referred to, there was a judgment entered against the United States, May 18, 1908. A motion for new trial was overruled in January, 1909 (January 4th). United States gave notice of appeal from a judgment of the latter date and ran into a motion to dismiss. The Supreme Court said, page 542 (L. ed.) :

"The grounds for the motion to dismiss are these: (a) that the appeal was not taken within ninety days after judgment (R. S. sec. 708; U. S. Comp. Stat. 1901, p. 575), and (b) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, 'but was merely from the order overruling the motion for a new trial.'

"The motion is without merit. *The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees* is, we think, applicable to judgments or decrees of the court of claims, and that rule treats a judgment or decree entered in the cause as not final for the purposes of appeal until the motion for new trial or petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition." (Emphasis supplied.)

Much to the same thought is *Pfister v. Northern Illinois Finance Corporation*, 317 U. S. 144, 63 Sup. Ct. 133, 137, holding "that an appeal does not lie from the denial of a petition for rehearing," citing in support among other cases, *Brocket v. Brocket*, 2 How. 238, 11 L. ed. 251.

To refer briefly to the jurisdictional cases relied on by petitioner as purporting to show conflict in the decision of the Circuit Court of Appeals for the Seventh Circuit and those from Second and Fifth Circuits, in *United States v. Steinberg*, 100 F. (2d) 124 (CCA 2nd) cited, the court had a default judgment before and order denying modification thereof. The court did not permit a formal mistake

merely on the date of the last order prevent consideration of the default judgment.

In *Crump v. Hill*, 104 F. (2d) 36 (CCA 5th), the court simply treated an acknowledgement of service of notice of appeal and designation of record and an appearance on appeal as the equivalent of filing notice of appeal.

In *Martin v. Clarke*, 105 F. (2d) 685, from the instant Seventh Circuit as well, the court merely held that where there was sufficient information in the notice of appeal to acquaint appellee as to the judgment appealed from, an interchange in designation of plaintiff and defendant was no ground to dismiss the appeal.

Milton v. United States, 120 F. (2d) 795 (CCA 5th), also cited, was a case which the Circuit Court of Appeals had previously sent back for trial on the merits. In such re-trial there was a verdict of not guilty. A motion for new trial was made; it was overruled, and an appeal was taken from the order overruling this motion. It ran into a motion to dismiss for want of finality in the decision appealed from under Section 128, Judicial Code. The Court did actually state, contrary to petitioner's point, there was not such a final judgment under this section fixing appellate jurisdiction, but, it went further, as the court said, page 796, in the interests of justice and to avoid prolonging litigation to no good purpose, and added, "without intending to create a precedent, we consider we may disregard the motion to dismiss the appeal and hear the case on the merits."

There is nothing in these cases relied on for conflict in decisions of Circuit Courts of Appeal for jurisdiction on certiorari to indicate that the decision in the instant case was other than in accord with the applicable federal practice authorities and statutes, we respectfully submit.

CONCLUSION.

Further, petitioner asserts that he was entitled to amend the notice of appeal so as to read as from a judgment (for the first time) in the Circuit Court of Appeals and further claims such right to amend under the Rules of Civil Procedure. At the outset on this proposition, it is to be noted the Rules in question were promulgated for District Courts, not the Circuit Courts of Appeal. Rule 1 is specific on the scope of the rules as for the District Courts.

Moreover we do not see that Rule 73 of these rules also cited by petitioner aids petitioner's right to amend. This rule in terms presumes the notice of appeal will be from a judgment, not from some other intermediate or interlocutory order in the cause.

Also, Rule 73 could have no reference to making a notice of appeal read as from a judgment, particularly so by amendments amounting to transmutations after the appeal had reached the reviewing court.

Moreover, clearly the petition to amend to transmute the notice of appeal into a judgment appeal for the first time came much too late in the Circuit Court. It was filed June 23, 1944 (rec. 186) and denied (rec. 207) along with a rehearing in the cause, June 30, 1944 (rec. 208).

In this regard the judgment of April 8, 1943, became final for purposes of appeal on the overruling of the motion for new trial August 3, 1943 (rec. 171), and when the notice of appeal in the cause was filed November 2, 1943

(rec. 171), the three months time limit for appeals under sec. 230 U.S.C.A. (previously set out) expired the next day. Consequently, any notice of appeal thereafter in June, 1944, came too late under the latter three months limitation statute. This is one reason for, whatever reason the Circuit Court of Appeals may have had, in declining to permit the proposed amendment.

Wherefore, it is submitted that the appeal was properly dismissed herein and the petition for the writ of certiorari should be denied.

Respectfully submitted,

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